

AMENDED IN SENATE MAY 27, 2005

AMENDED IN SENATE APRIL 19, 2005

**SENATE BILL**

**No. 300**

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**Introduced by Senator Kuehl**

February 16, 2005

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An act to amend Section 12945.2 of the Government Code, relating to family and medical leave.

LEGISLATIVE COUNSEL'S DIGEST

SB 300, as amended, Kuehl. Family and medical leave.

Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. Under the act, "child" means a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18 or an adult dependent child. The act defines "parent" to mean the employee's biological, foster, adoptive, or stepparent, legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

This bill would increase the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a

serious health condition, ~~and (2) expanding the definition of “parent” to include an employee’s parent-in-law, and (3) permitting an employee to take leave to care for a seriously ill grandparent, sibling, or domestic partner, as defined.~~

This bill would also provide that an employer violates the act if it fails to grant, or otherwise interferes with an employee’s right to take, family care and medical leave for an employee entitled to leave who properly requests the leave. The bill would substitute the term “family member” for parent, grandparent, sibling, child, domestic partner, or spouse, for purposes of authorizing an employee to take leave to care for a family member with a serious health condition. This bill would additionally provide that care for, as used in the act, includes both physical and psychological care, as specified, and that an employee may, but need not, be involved or participating in providing the direct medical care of the family member.

The bill would require that an employer that knows or has reason to know that an employee may need family care and medical leave provide the employee with specified information regarding the right to family care and medical leave within 2 business days of the date the employer learns of the need for leave. The bill would authorize an employee who is deprived of his or her right to family care and medical leave as a result of the employer’s failure to provide the employee with that information to bring a claim for a violation of the act. The bill would also require the Fair Employment and Housing Commission to develop a form that includes the information that the employer must provide to employees, and require that the department make the form available to employers.

Under existing law, the act authorizes an employer to require that an employee’s request for leave to care for a child, spouse, or parent with a serious health condition, or for the employee’s own serious health condition, be supported by a certification by a health care provider.

This bill would prohibit the employer from, as a condition of granting leave, requiring the employee to disclose the underlying diagnosis or course of treatment of the employee or the employee’s family member. The bill would also provide that the employee need not disclose his or her diagnosis or course of treatment, or the diagnosis or course of treatment of a family member, as a condition for receiving leave.

Existing law prohibits the act and any amendments to the act from being construed to require any changes in existing collective

bargaining agreements during the life of the contract or until specified dates, whichever occurs first.

This bill would delete those provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 12945.2 of the Government Code is amended to read:

12945.2. (a) (1) Except as provided in subdivision (b), it shall be an unlawful employment practice for any employer, as defined in paragraph (5) of subdivision (c), to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave.

(2) An employer shall be deemed to be in violation of this section if it fails to grant job-protected family care and medical leave to an employee who is entitled to leave under this section and who makes a request for time off as described in paragraph (3) of subdivision (j), or if it otherwise interferes with an employee's right to leave under this section.

(3) To comply with this section, the employer shall, upon granting the leave, provide to the employee a guarantee of employment in the same or a comparable position upon the termination of the leave.

(b) Notwithstanding subdivision (a), it shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed.

(c) For purposes of this section:

(1) "Care for" shall encompass both physical and psychological care, and an employee providing care may, but need not, be involved or participating in providing the direct medical care of a family member who has a serious health condition. "Care for" shall include the following:

1 (A) Providing assistance with medication or other medical  
2 treatments.

3 (B) Providing assistance with hygienic, nutritional, or safety  
4 needs.

5 (C) Providing transportation to medical appointments.

6 (D) Providing psychological comfort and reassurance.

7 (E) Filling in for others who are caring for the family member  
8 or making arrangements for third-party care.

9 (F) Assisting with transfers required by the serious medical  
10 condition, such as relocation to a care facility or a more  
11 accessible residence.

12 (G) Spending time with a family member at the end of the  
13 family member's life.

14 (2) "Child" means a biological, adopted, or foster child, a  
15 stepchild, a legal ward, or a child of a person standing in loco  
16 parentis.

17 (3) "Comparable position" means a position that is virtually  
18 identical to the employee's former position in terms of pay,  
19 benefits, and working conditions, including privileges,  
20 prerequisites, and status. A comparable position must include  
21 duties and responsibilities that are the same or substantially  
22 similar to those of the employee's former position, and that entail  
23 substantially equivalent skill, effort, responsibility, and authority.

24 (4) "Domestic partner" has the same meaning set forth in  
25 Section 297 of the Family Code.

26 (5) "Employer" means either of the following:

27 (A) Any person who employs, supervises, or controls 50 or  
28 more persons who perform services for a wage or salary.

29 (B) The state, and any political or civil subdivision of the state  
30 and cities.

31 (6) "Family care and medical leave" means any of the  
32 following:

33 (A) Leave for reason of the birth of a child of the employee or  
34 the placement of a child with an employee in connection with the  
35 adoption or foster care of the child by the employee.

36 (B) Leave to care for a family member who has a serious  
37 health condition. The fact that an employee spends time with a  
38 family member with a serious health condition shall create a  
39 rebuttable presumption that the employee is caring for the family  
40 member.

1 (C) Leave because of an employee's own serious health  
2 condition that makes the employee unable to perform the  
3 functions of the position of that employee, except for leave taken  
4 pursuant to subdivision (a) of Section 12945.

5 (7) "Family member" means parent, grandparent, sibling,  
6 child, domestic partner, or spouse.

7 (8) "FMLA" means the federal Family and Medical Leave Act  
8 of 1993 (P.L. 103-3).

9 (9) "Health care provider" means any of the following:

10 (A) An individual holding either a physician's and surgeon's  
11 certificate issued pursuant to Article 4 (commencing with Section  
12 2080) of Chapter 5 of Division 2 of the Business and Professions  
13 Code, an osteopathic physician's and surgeon's certificate issued  
14 pursuant to Article 4.5 (commencing with Section 2099.5) of  
15 Chapter 5 of Division 2 of the Business and Professions Code, or  
16 an individual duly licensed as a physician, surgeon, or  
17 osteopathic physician or surgeon in another state or jurisdiction,  
18 who directly treats or supervises the treatment of the serious  
19 health condition.

20 (B) Any other person determined by the United States  
21 Secretary of Labor to be capable of providing health care  
22 services under the FMLA.

23 (10) "Parent" means a biological, foster, or adoptive parent, a  
24 stepparent, ~~a parent-in-law~~, a legal guardian, or other person who  
25 stood in loco parentis to the employee when the employee was a  
26 child.

27 (11) "Serious health condition" means an illness, injury,  
28 impairment, or physical or mental condition that involves either  
29 of the following:

30 (A) Inpatient care in a hospital, hospice, or residential health  
31 care facility.

32 (B) Continuing treatment or continuing supervision by a health  
33 care provider.

34 (d) An employer shall not be required to pay an employee for  
35 any leave taken pursuant to subdivision (a), except as required by  
36 subdivision (e).

37 (e) An employee taking a leave permitted by subdivision (a)  
38 may elect, or an employer may require the employee, to  
39 substitute, for leave allowed under subdivision (a), any of the  
40 employee's accrued vacation leave or other accrued time off

1 during this period or any other paid or unpaid time off negotiated  
2 with the employer. If an employee takes a leave because of the  
3 employee's own serious health condition, the employee may also  
4 elect, or the employer may also require the employee, to  
5 substitute accrued sick leave during the period of the leave.  
6 However, an employee shall not use sick leave during a period of  
7 leave in connection with the birth, adoption, or foster care of a  
8 child, or to care for a family member with a serious health  
9 condition, unless mutually agreed to by the employer and the  
10 employee.

11 (f) (1) During any period that an eligible employee takes  
12 leave pursuant to subdivision (a) or takes leave that qualifies as  
13 leave taken under the FMLA, the employer shall maintain and  
14 pay for coverage under a "group health plan," as defined in  
15 Section 5000(b)(1) of the Internal Revenue Code of 1986, for the  
16 duration of the leave, not to exceed 12 workweeks in a 12-month  
17 period, commencing on the date leave taken under the FMLA  
18 commences, at the level and under the conditions coverage  
19 would have been provided if the employee had continued in  
20 employment continuously for the duration of the leave. Nothing  
21 in the preceding sentence shall preclude an employer from  
22 maintaining and paying for coverage under a "group health plan"  
23 beyond 12 workweeks. An employer may recover the premium  
24 that the employer paid as required by this subdivision for  
25 maintaining coverage for the employee under the group health  
26 plan if both of the following conditions occur:

27 (A) The employee fails to return from leave after the period of  
28 leave to which the employee is entitled has expired.

29 (B) The employee's failure to return from leave is for a reason  
30 other than the continuation, recurrence, or onset of a serious  
31 health condition that entitles the employee to leave under  
32 subdivision (a) or other circumstances beyond the control of the  
33 employee.

34 (2) (A) Any employee taking leave pursuant to subdivision (a)  
35 shall continue to be entitled to participate in employee health  
36 plans for any period during which coverage is not provided by  
37 the employer under paragraph (1), employee benefit plans,  
38 including life, short-term, or long-term disability or accident  
39 insurance, pension and retirement plans, and supplemental  
40 unemployment benefit plans to the same extent and under the

1 same conditions as apply to an unpaid leave taken for any  
2 purpose other than those described in subdivision (a). In the  
3 absence of these conditions an employee shall continue to be  
4 entitled to participate in these plans and, in the case of health and  
5 welfare employee benefit plans, including life, short-term, or  
6 long-term disability or accident insurance, or other similar plans,  
7 the employer may, at his or her discretion, require the employee  
8 to pay premiums, at the group rate, during the period of leave not  
9 covered by any accrued vacation leave, or other accrued time off,  
10 or any other paid or unpaid time off negotiated with the  
11 employer, as a condition of continued coverage during the leave  
12 period. However, the nonpayment of premiums by an employee  
13 shall not constitute a break in service, for purposes of longevity,  
14 seniority under any collective bargaining agreement, or any  
15 employee benefit plan.

16 (B) For purposes of pension and retirement plans, an employer  
17 shall not be required to make plan payments for an employee  
18 during the leave period, and the leave period shall not be required  
19 to be counted for purposes of time accrued under the plan.  
20 However, an employee covered by a pension plan may continue  
21 to make contributions in accordance with the terms of the plan  
22 during the period of the leave.

23 (g) During a family care and medical leave period, the  
24 employee shall retain employee status with the employer, and the  
25 leave shall not constitute a break in service, for purposes of  
26 longevity, seniority under any collective bargaining agreement,  
27 or any employee benefit plan. An employee returning from leave  
28 shall return with no less seniority than the employee had when  
29 the leave commenced, for purposes of layoff, recall, promotion,  
30 job assignment, and seniority-related benefits such as vacation.

31 (h) If the employee's need for a leave pursuant to this section  
32 is foreseeable, the employee shall provide the employer with  
33 reasonable advance notice of the need for the leave.

34 (i) If the employee's need for leave pursuant to this section is  
35 foreseeable due to a planned medical treatment or supervision,  
36 the employee shall make a reasonable effort to schedule the  
37 treatment or supervision to avoid disruption to the operations of  
38 the employer, subject to the approval of the health care provider  
39 of the individual requiring the treatment or supervision.

(j) (1) An employer that knows or has reason to know that an employee may need leave pursuant to this section shall, within two business days of the date the employer learns of the need for leave, provide the employee with written information about the right to family care and medical leave, including the following:

(A) The right to family care and medical leave of up to 12 workweeks where the conditions of subdivision (a) are met.

(B) The right to be restored to the same or equivalent job upon return from leave.

(C) Notice that the leave will be counted against the employee's annual leave entitlement.

(D) The right to intermittent leave.

(E) Any requirement the employer has regarding a medical certification, as described in subdivisions (k) and (l).

(F) Any requirement the employer has, consistent with subdivision (e), that the employee use accrued vacation leave, accrued sick leave, or other accrued time off or any other paid or unpaid time off during the leave allowed under subdivision (a).

(G) The employee's right, consistent with subdivision (e), to elect to use accrued vacation leave, accrued sick leave, or other accrued time off or any other paid or unpaid time off during the leave allowed under subdivision (a).

(H) The employee's right to protection from retaliation and discrimination as described in subdivision (n).

(I) Information regarding the procedures for filing complaints of violations of this section with the department.

(J) Information regarding the employee's potential eligibility for paid family leave benefits through the state disability insurance program (Chapter 7 (commencing with Section 3300) of Part 2 of Division 1 of the Unemployment Insurance Code).

(2) The commission shall develop a form that includes the items specified in subparagraphs (A) to (J), inclusive, of paragraph (1) and shall make this form readily available to employers covered by this section.

(3) An employer shall be deemed to know that an employee may need leave pursuant to this section whenever it receives from or on behalf of an employee a request for time off from work that makes reference to either of the following as a reason for the request:



1 (A) The birth of a child of the employee or the placement of a  
2 child with an employee in connection with the adoption or foster  
3 care of the child by the employee.

4 (B) The medical condition of the employee, a child of the  
5 employee, or a family member, where the condition could  
6 reasonably constitute a “serious health condition” as defined in  
7 paragraph (11) of subdivision (c).

8 (4) An employee who, as a result of the employer’s failure to  
9 comply with paragraph (1), is deprived of his or her right to  
10 family care and medical leave, may bring a claim for violation of  
11 this section.

12 (k) An employee need not disclose his or her diagnosis or  
13 course of treatment, or the diagnosis or course of treatment of a  
14 family member, as a condition for receiving leave.

15 (l) (1) An employer may require that an employee’s request  
16 for leave to care for a family member who has a serious health  
17 condition be supported by a certification issued by the health care  
18 provider of the individual requiring care. That certification shall  
19 be sufficient if it includes all of the following:

20 (A) The date on which the serious health condition  
21 commenced.

22 (B) The probable duration of the condition.

23 (C) An estimate of the amount of time that the health care  
24 provider believes the employee needs to care for the individual  
25 requiring the care.

26 (D) A statement that the serious health condition warrants the  
27 participation of a family member to provide care during a period  
28 of the treatment or supervision of the individual requiring care.

29 (2) In accordance with the right to privacy protected by  
30 Section 1 of Article I of the California Constitution, the employer  
31 shall not, as a condition of granting leave, require the employee  
32 to disclose his or her underlying diagnosis or course of treatment  
33 or the diagnosis or course of treatment of a family member,  
34 either through the medical certification process or by any other  
35 means.

36 (3) Upon expiration of the time estimated by the health care  
37 provider in subparagraph (C) of paragraph (1), the employer may  
38 require the employee to obtain recertification, in accordance with  
39 the procedure provided in paragraph (1), if additional leave is  
40 required.

(m) (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:

(A) The date on which the serious health condition commenced.

(B) The probable duration of the condition.

(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.

(2) In accordance with the right to privacy protected by Section 1 of Article I of the California Constitution, the employer shall not, as a condition of granting leave, require the employee to disclose his or her underlying diagnosis or course of treatment or the diagnosis or course of treatment of a family member, either through the medical certification process or by any other means.

(3) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

(4) (A) In any case in which the employer has reason to doubt the validity of the certification provided pursuant to this section, the employer may require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information certified under paragraph (1).

(B) The health care provider designated or approved under subparagraph (A) shall not be employed on a regular basis by the employer.

(C) In any case in which the second opinion described in subparagraph (A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning the information certified under paragraph (1).

(D) The opinion of the third health care provider concerning the information certified under paragraph (1) shall be considered

1 to be final and shall be binding on the employer and the  
2 employee.

3 (E) Where an employer fails to contest the certification  
4 provided pursuant to this section, the certification provided shall  
5 be presumed final and binding on the employer.

6 (5) As a condition of an employee's return from leave taken  
7 because of the employee's own serious health condition, the  
8 employer may have a uniformly applied practice or policy that  
9 requires the employee to obtain certification from his or her  
10 health care provider that the employee is able to resume work.  
11 Nothing in this paragraph shall supersede a valid collective  
12 bargaining agreement that governs the return to work of that  
13 employee.

14 (n) It shall be an unlawful employment practice for an  
15 employer to refuse to hire, or to discharge, fine, suspend, expel,  
16 or discriminate or retaliate against, any individual because of any  
17 of the following:

18 (1) An individual's exercise of the right to family care and  
19 medical leave provided by subdivision (a).

20 (2) An individual's giving information or testimony as to his  
21 or her own family care and medical leave, or another person's  
22 family care and medical leave, in any inquiry or proceeding  
23 related to rights guaranteed under this section.

24 (o) The provisions of this section shall be construed as  
25 separate and distinct from those of Section 12945.

26 (p) Leave provided for pursuant to this section may be taken in  
27 one or more periods. The 12-month period during which 12  
28 workweeks of leave may be taken under this section shall run  
29 concurrently with the 12-month period under the FMLA, and  
30 shall commence the date leave taken under the FMLA  
31 commences, except as specified in subdivision (s).

32 (q) In any case in which both parents entitled to leave under  
33 subdivision (a) are employed by the same employer, the  
34 employer shall not be required to grant leave in connection with  
35 the birth, adoption, or foster care of a child that would allow the  
36 parents family care and medical leave totaling more than the  
37 amount specified in subdivision (a).

38 (r) (1) Notwithstanding subdivision (a), an employer may  
39 refuse to reinstate an employee returning from leave to the same  
40 or a comparable position if all of the following apply:

1 (A) The employee is a salaried employee who is among the  
2 highest paid 10 percent of the employer's employees who are  
3 employed within 75 miles of the worksite at which that employee  
4 is employed.

5 (B) The refusal is necessary to prevent substantial and  
6 grievous economic injury to the operations of the employer.

7 (C) The employer notifies the employee of the intent to refuse  
8 reinstatement at the time the employer determines the refusal is  
9 necessary under subparagraph (B).

10 (2) In any case in which the leave has already commenced, the  
11 employer shall give the employee a reasonable opportunity to  
12 return to work following the notice prescribed by subparagraph  
13 (C).

14 (s) Leave taken by an employee pursuant to this section shall  
15 run concurrently with leave taken pursuant to the FMLA, except  
16 for any leave taken under the FMLA for disability on account of  
17 pregnancy, childbirth, or related medical conditions that also  
18 qualifies for leave pursuant to subdivision (a) of Section 12945.  
19 The aggregate amount of leave taken under this section or the  
20 FMLA, or both, except for leave taken for disability on account  
21 of pregnancy, childbirth, or related medical conditions, shall not  
22 exceed 12 workweeks in a 12-month period. An employee is  
23 entitled to take, in addition to the leave provided for under this  
24 section and the FMLA, the leave provided for in Section 12945,  
25 if the employee is otherwise qualified for that leave.